

Short Note

December 5. 1765.

Unto the Right Honorable the Lords of Council and Session,

P E T I T I O N

Sir WILLIAM MAXWELL of Calderwood,
Baronet,

Humbly sheweth,

THAT several differences having arisen between the petitioner and his vassals, mutual declarators were raised; which having come before your Lordships on a state, an interlocutor determining the different questions was of this date pronounced; the whole of which it is unnecessary to recite, as the present application relates only to the deduction claimed from the thirlage for the teind; as to which the first interlocutor found, "That as the teind payable to the college of Glasgow is payable in rental bolls of meal, therefore that the oats for said meal must be grinded at the pursuer's mill, and that the same is liable to pay intown culture."

That the vassals preferred a reclaiming petition against this interlocutor, praying your Lordships to find, "That the tithes of the petitioners lands are not astricted to Sir William Maxwell's mill; or at least to find, That the tithe is only

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Aug. 1. 1765
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"astricted so far as the petitioners shall find it necessary to
"grind it into meal."

Upon advising this petition, with answers, your Lordships
Nov. 27. 1765 found, "That the teinds of the petitioners lands are not a-
"stricted to the respondent's mill."

As this question is of some consequence to the petitioner,
and of the greatest importance in point of precedent, he will
be pardoned for submitting it once more to the consideration
of your Lordships.

The petitioner stands heritably infest and seised, by charter
under the great seal, in the lands and barony of Calderwood,
comprehending, *inter alia*, the lands of Jacktown, Newlands,
and Allartown, and also in the Drip-mill, astricted multures,
sucken, and sequels thereof.

The petitioner's vassals, to whom the whole of Jacktown
and Newlands, and part of Allartown, belong in property,
in virtue of grants from his predecessors, all which are con-
ceived pretty much in the same style, are thirled to his mill
by a clause of the following tenor. "Et cum astrictedis mul-
"turis molendino meo, constructo aut construendo, infra vi-
"ginti libratas terrarum mearum de Drappis et Jacktown,
"mei molendini, solvi solitis et consuetis." Excerpts of the
different charters to the vassals are in process; and from one
of these in 1562 the above clause is copied; which therefore
shows how ancient a thirlage this is, when, above 200 years
ago, reference was had to the former usage and custom for
regulating the *modus* of it.

Though these charters do not specify of what kind the thir-
lage was, but refer to use and wont, it is undeniably true,
that a thirlage of *omnia grana crescentia* as to the oats took
place, with no other exception than that of seed and horse corn.
Such your petitioner averred to have been the immemorial
State, p. 6. F. practice, in the 6th article of his condescendence; the vassals
could not controvert the fact; and it came clearly out in proof,
both by parole and written evidence. Thus Archibald Alex-
ander

ander depones, " That the whole of the defenders, and their State, p. 14. G.
 " authors and their predecessors in the lands libelled, were in
 " use to grind their oats at the said Drip-mill. Depones,
 " When any of the vassals sold their oats, they paid therefor
 " in corn; and the deponent himself uplifted the corn so
 " paid for different years." John Hervie depones, " That — p. 16. B.
 " the possessors of the said lands, when they sold their corn,
 " and did not grind their oats at the said mill, were in use to
 " pay the miller a peck of corn for each boll of corn so sold."
 John Hamilton depones, " He knows that the vassals in — p. 21. B.
 " Jacktown, when they did not carry their oats to the Drip-
 " mill, to be there grinded, were in use to pay the miller the
 " seventeenth peck of the quantity of oats abstracted for dry
 " multures; and that the vassals in Newlands, for their ab-
 " stractions, were in use to pay the said miller the one and
 " twentieth part of the oats they abstracted also for dry mul-
 " ture." John Ritchie depones, " That when he abstracted — p. 34. H.
 " any of his corns from the Drip-mill, he paid the five and
 " twentieth peck to the miller upon that account. Depones,
 " That he frequently abstracted grain, whether corn, bear,
 " or pease, from the said mill: That when he abstracted his
 " bear and his pease, nothing was ever demanded from him
 " on that account." And many of the other witnesses con-
 cur.

As to written evidence, there are a variety of tacks and
 decreets in process which establish this proposition. The pe-
 titioner shall only refer to the complaint of Robert Reid, af-
 fignee of John Gilmour miller at Drip-mill; which sets forth, — p. 40. I-
 " That the foresaid lands, all lying within the foresaid baro-
 " ny of Calderwood, and belonging in property and superio-
 " rity to Sir William Maxwell, were thirled and sucken to the
 " said Sir William's mill of Drip-mill: That the persons
 " therein complained on, by their tacks, or the set made to
 " them, and the vassals by their charters, feu-contracts, or
 " other rights, are bound to carry the whole of the corn or
 " oats

“ oats that grow on the foresaid lands (seed and horse corn
 “ excepted) to that mill, and to pay multures, knaveship, dam
 “ and kain corn therefor, and other services to the mill, con-
 “ form to use and wont.” Then the complaint proceeds to
 set forth the quantities abstracted, and the multures due there-
 for, for which it concludes.

Against this complaint the defenders did not plead any ex-
 emption on account of the teind, which would have more than
 covered the abstractions for which they were sued; and upon
 the libel being referred to their oaths, they deponed as to the
 quantity abstracted, and as to the multure exigible therefor.

Though it is thus clear, that, at the constitution of the thir-
 lage, it was understood and intended, that the whole growing
 oats should be astricted, without any exception for teind; yet
 it is no doubt true, that neither the petitioner nor his vassals,
 nor their predecessors, then had or yet have a right to the
 teinds. The teinds belonged originally to the Bishop of Glas-
 gow, and were, in 1617, granted by King James VI. to the
 college of Glasgow, to which they presently belong; and must
 always do so, as by law such teinds, though they may be va-
 lued, yet cannot be sold: And it is agreed on both sides, that
 these teinds, for time out of memory, and indeed for ages
 past, have not been drawn, but rental bolls of meal accepted
 in place of the parsonage, and certain small sums of money in
 place of the vicarage; and of late, as the delivery of these ren-
 tal bolls in kind proved inconvenient to the college, as well as
 to those that were liable for them, the college has been in use
 of receiving a composition or conversion in money for these
 bolls, according to what they call the *college-fiars*, which are
 struck annually in order to regulate cases of this kind. But
 it will be observed, that the sum which the college receives
 annually on this account, is not a sum or composition in place
 of the teind, but in lieu of the rental bolls, which were in use
 to be paid in place of the teind.

So

So standing the fact, the petitioner does not dispute but his vassals would be intitled to a deduction from the thirlage of the *omnia grana crescentia* of their oats, in case the college shall draw the *ipsa corpora*, which it is to the last degree improbable they ever will. But he humbly contends, that when the teinds are not drawn, it ought not to be optional to his vassals to grind them or not at his mill.

The first interlocutor went upon the circumstance of the teind being payable in rental bolls: and the petitioner's vassals, in reclaiming against it, were at much pains to show, that neither they nor the college were bound to continue the use of payment of these rental bolls, which they insisted were not equal to a valuation, but that either party might refile from them, and pursue a valuation, to be ascertained from the present rent of the lands, or that the college might demand or they deliver the *ipsa corpora*.

In answer to this it was observed, on the part of the petitioner, That it was highly improbable that ever the college would attempt any such thing; and if they should, there could be no other rule for the valuation of these tithes but the rental bolls immemorially paid; according to Lord Stair, book 2. tit. 8. par. 14. "The rule prescribed by the King for valuation of teinds, to fix them to a constant yearly duty, was this, That where the teinds were severally known from the stock, and set by tack or rental, the same should also be valued severally, deducing a fifth part for the ease of the heritor; because frequently the churchmen had drawn the rate of the teind above the just value, by their stocked and rental bolls. But where the stock and teind were not severally known, the fifth part of the rent was decerned to be for the teind."

As therefore the fifth of the gross rent could not be the valuation in this case, because that is only a rule where the teinds were not severally known, it seems clear that the rental-bolls behoved to be the rule: so that though there is not

in this case any actual decret of valuation, there is what is equivalent; as by immemorial usage, and the college rental, the same rate of teind is established as would be the rule was a valuation to be sued for; so that there is here really in effect a valuation by consent; consequently tho' the use of payment of these rental-bolls would be no objection to the college drawing the teinds, yet as the petitioner's vassals would be intitled to have their teinds valued, and as these rental bolls would be the rule of such valuation, matters would stand precisely on the same footing they now do, with this only difference, that these rental-bolls would be established by decret of valuation to be the rule in time coming, as by voluntary agreement and valuation they have been the rule in time past.

But the petitioner has no occasion to insist upon this in the argument he is now humbly to maintain; which is in substance, That though neither the petitioner nor his vassals could in this case thirl the teind, so far as the interest of the college is concerned, or to prejudge the college's right to draw the *ipsa corpora*; yet they could thirl their possession of that teind; that is, an obligation could be laid upon the vassals to grind at the petitioner's mill all their oats growing on their land, without exception of the teind, as long as they were allowed to possess and intromit with the teind: That such was the nature of the astringtion they came under, and consequently that they can claim no deduction from the thirlage on account of the teind, as long as the college of Glasgow does not actually draw it from them.

It was said for the vassals, That thirlage was odious, and therefore should not be enlarged or extended by construction.

But though maxims of this kind have been frequently thrown out in questions of this nature, the petitioner conceives they have no solid foundation. Mills are very useful, but at the same time very expensive machines; and it is said thirlage was introduced in order to encourage people to erect them, by securing to them employment. If this was the origin

gin of thirlage, it is plain that from its commencement, expediency and public utility required, that it should be liberally interpreted and enforced: and even afterwards when it became usual to astrict feuars and tenants, and oblige them to pay a certain multure, there is no reason why the obligation should be reckoned grievous; because in such cases it is evident, that the multure is part of the feu-duty or rent, which must be diminished in proportion as the other is increased; and consequently it must be wrong not to put as favourable a construction upon the astrictive clause as on any other stipulation in the contract of feu or tack. Accordingly your Lordships have never been in use of applying that strict interpretation to thirlages that you have to entails, and other deeds, which are justly reckoned odious in the eye of law; but have checked every attempt to disappoint the meaning of parties in astrictions; and supported and enforced a *bona fides* in them, as much as in other contracts. Various cases of this nature will readily occur to your Lordships; and the petitioner shall only transcribe the interlocutor in the case of Musselburgh, which was as follows. “ Find, That it does not appear from
“ the constitution of the pursuers thirlage, nor from the
“ proof brought by them of the possession upon it, that the
“ same does extend to *omnia grana crescentia*, or to *invecta et*
“ *illata*; and the defenders are only astricted for such grains
“ of the growth of the lands as shall be necessary for the
“ maintenance of their families, or shall be made into meal,
“ flour, or malt, for sale; declaring, that it shall not be law-
“ ful for the possessors of the said lands to sell their corns,
“ and to buy meal outwith the thirl for their own consumpt;
“ and that in such case they shall be liable to pay multure for
“ the meal so bought by them: And also find, That in case
“ the possessors of the lands shall buy corn outwith the thirl,
“ to be made into meal or flour for the use of their own fa-
“ milies, they shall be obliged to grind the same at the pur-
“ suers mills, and to pay insucken multures therefor: And
“ find,

“ find, That if the defenders sell their own bear, and import
 “ grinded malt, they must pay multure therefor; and if they
 “ import ungrinded malt, in order to grinding for the use of
 “ their families, they must grind the same at the pursuers
 “ mills.”

When a thirlage of *omnia grana crescentia* is constituted, it is plain that all sort of corn falls under it, according to the proper meaning of the words, without any deduction for seed-corn, horse-corn, and teind; because all these did in fact grow upon the ground, and consequently, strictly speaking, are within the astrictive clause: but if the person thirled were sued for the multure of such corns, he no doubt would have this plea in equity, That it could not be understood or intended by either party, that such corns should be astricted, as it would really have been obliging him to an impossibility, viz. to grind at the mill what he was obliged to give to his horses, sow upon the ground, or deliver to the titular; and therefore the words of the contract, which are broader than the will of parties, should be restricted.

But if the person thirled keeps no horses, or gives no corn to those he does keep, and delivers no corn to the titular, the case seems to alter, and the thirlage ought to take place over the whole; because it is not to be presumed that parties could mean by a thirlage of *omnia grana crescentia*, that only a part should be astricted, when there was nothing to hinder the whole from being brought to the mill. The words naturally import a total astriction. An impossibility of grinding a part may indeed be a good reason for exeeming that part, when the impossibility subsists; but when that flies off, there can be no reason why the effect should be kept up, after the cause has ceased.

But the petitioner has no occasion to carry his argument so far; for your Lordships will observe, that when the thirlage in question was constituted, the persons thirled did not deliver the *ipsa corpora* of the tithes to the titular; on the contrary,

ry, they were allowed to possess and intromit with the whole tithes, and were obliged only to deliver a certain number of bolls of meal, or the petitioner shall suppose, to pay a certain sum of money, which will make no variation in the present argument. The question then comes to be, Whether a person who has been in the immemorial use, not of delivering the *ipsa corpora* of the tithes to the titular, but of paying a certain quantity of meal, or sum of money therefor, and has, while in that situation, come under an astringency of *omnia grana crescentia*, can exempt the tenth part of his corn, on pretence that the titular may draw it if he inclines, notwithstanding the practice hitherto? The petitioner humbly apprehends that he cannot. The obvious answer to his plea is, That though he did not, and could not thirl the teind, yet he could and did thirl his own possession; and therefore the thirlage must be commensurate to it: When he possesses the whole, the whole will be thirled; when he is dispossessed of any part, the thirlage *pro tanto* will cease.

But the case just now put is narrower than the petitioner's; for it seems indisputable, that a superior and vassal may enter into a contract to this purpose, That the whole oats growing on the vassal's land shall be thirled to the superior's mill; and that though neither party has right to the teinds, yet as the vassal has been for time immemorial allowed to possess and intromit with the teinds, he shall therefore be obliged to bring the whole corns, without any exception on account of teinds, to the superior's mill. If, after such agreement, the titular should refile from the ancient practice, and actually draw the teind, the petitioner does not dispute but the vassal should be relieved *pro tanto* from the astringency; but as long as the titular does not actually draw the teind, the petitioner cannot perceive upon what medium the vassal should be intitled to abstract any of his corns, as the bargain is every way fair and legal.

It may perhaps be asked, What evidence there is that the
C astringency

astriction in question was conceived in these terms? The petitioner answers, The best evidence in the world ; uniform, uninterrupted practice for ages, distinctly proved by the petitioner, and fairly admitted by his vassals ; from which it appears, that they have all along brought the whole oats growing on their lands to his mill, without claiming any deduction on account of teind ; and paid in-town multure for the whole, without any distinction between the stock and teind ; and have suffered themselves to be decreed in penalties, sometimes in *duplum*, for their abstractions, from which the exemption now pleaded would have much more than protected them, and which therefore they never would have omitted, had they had the least suspicion that they were intitled to it.

What has been above stated, it is hoped, will afford a sufficient answer to the argument urged for the vassals, " That
 " in reason and law, when lands are astricted to a mill, the
 " tithes of such lands are not comprehended in the thirlage,
 " unless where the tithes of the lands do belong to the heri-
 " tors prior to the thirlage ; because no person can be presu-
 " med or understood to astrict to a mill, what does not be-
 " long to himself, and over which he has no power or com-
 " mand ; which is undoubtedly the case, with regard to the
 " tithes of lands belonging to a titular, different from the
 " proprietor of the lands astricted." The above argument seems to suppose, that the astriction was the voluntary act and deed of the vassals ; whereas it was the act of the petitioner's predecessors, who made the astriction an express condition and quality in the grants to the vassals. But it is of no consequence, whether the astriction was constituted before or after they got their feus : for the petitioner does not maintain, that by the astriction in question, the teind could be thirled to the prejudice or exclusion of the titular's right ; but he does maintain, That the possession of it by his vassals could be thirled ; that by their coming under an astriction
 of

of *omnia grana crescentia*, it must be presumed and understood, they meant to thirl that possession; and that supposing there should be room for some doubt of that proposition in general, there can be none in this particular case, because of the uniform uninterrupted practice for centuries past, of bringing the whole oats, teind and stock, to the petitioner's mill; which affords complete legal evidence, that it was understood, and intended by the parties, when the thirlage was constituted, that no deduction was to be claimed on account of the teind, so long as the vassals met with no obstruction from the titular.

It was further observed for the vassals, That the teind behoved either to be thirled or not; and that it could not be sometimes thirled, sometimes not, according as it was possessed by the vassals, or drawn by the titular.

But, with submission, a variety of cases may be figured, and must often happen, in which not only a thirlage of the teind, but a thirlage of the stock, must fluctuate, ceasing and reviving by turns, according to different events.

Thus, for example, if a vassal thirls his lands to another's mill, when the fee opens to the superior, in consequence of ward or non-entry, the thirlage will cease during the superior's possession, and revive when the vassal is reinstated; *December 11. 1666, Earl of Cassils contra tenants of Dalmorton.*

Again, there is nothing to hinder a wadsetter to thirl the lands wadset during his possession, but, upon redemption, the lands will become free: And the same will hold in astrictions agreed to by liferenters or tacksmen. Vassals, wadsetters, liferenters, tacksmen, can, by agreeing to astrictions, bind their own rights; but they cannot prejudice the right of the superior, reverser, fiar, or proprietor: and therefore the endurance of the thirlage must depend upon the continuance of their right.

As there can be no doubt, that a tacksmen of lands may thirl his corns; so there seems as little doubt, that a tacksmen of tithes may thirl, not indeed the tithes, but his possession of

of them. A tacksmen of lands cannot thirl the lands to a strange mill; because he has not the right of property in him; but he may thirl his crops and possession. In the same way, a tacksmen of tithes cannot indeed thirl the tithes, because he has not the right of titularity in him; but he may thirl or oblige himself to grind at a mill the *ipsa corpora* during the course of his tack; because he has the right of possession in him. Now supposing that the petitioner's vassals had a tack of their teinds from the college of Glasgow, when the thirlage in question was constitute, why might they not have obliged themselves to grind at the petitioner's mill the *ipsa corpora* of the tithes, during the years of their tack? They could not enter into an astringion, so as to prejudge the right of the titular; but what should hinder them to enter into an astringion, so as to prejudge only their own possession? The petitioner's vassals have not, and indeed had not when the thirlage was constitute, a tack from the college; but they had been in possession of the tithes for time immemorial, before the thirlage was constituted, as well as they have been ever since. What then was to hinder them from obliging themselves to grind the tithes, as well as the other corns, in the petitioner's mill, as long as they possessed them, as such astringion did not in the least hurt the right of the titular, but only their own right of possession?

And it is to be noticed, that though the petitioner's vassals were to obtain a tack of the teinds from the college, that would not free them from the thirlage as to the teinds; because that would give them no more right than what they had when they agreed to the astringion, viz. the right of possession.

The case perhaps might be attended with more difficulty, if the vassals should acquire the titularity, (which however they never can do); for it might then be contended, with some appearance of reason, that they could not be presumed and understood to have meant to thirl a right that was not in them at the time

time of the astrictiō; and, consequently, that upon their acquiring the right of titularity, it behoved to have the same effect in their person, as it would have had when exercised in the person of the titular: and it does not occur what other answer could be made, than that as they had come under an astrictiō to grind the teind, as well as the other corn, while they possessed it, they ought not to have acquired a right *in fraudem* of that obligation, and therefore should be barred from insisting on it. What should be the determination, in case the petitioner's vassals had now the right of titularity in them, it is needless to inquire; as they have it not, and never can, the teinds in question being unfaleable. But the petitioner must observe, that his vassals have all along argued against him, as if he maintained that they could thirl a right which was not in them, *viz.* the right to the tithes; whereas that is by no means the petitioner's argument. He does not say that they could thirl the right to the tithes, which they had not; but he does say, they could thirl the possession of the tithes, which they had.

This distinction affords a good answer to the decision founded on by the petitioner's vassals from Durie, July 7. 1635, Laird of Innerwick. It is thus collected: " A decret being
 " given at the Laird of Innerwick's instance, against one Hamilton, finding the corns growing upon the said Hamilton's lands of *to be astricted to the Laird*
 " of Innerwick's mill of Bancriff; whereupon he being charged to pay the multures of the corns growing thereon,
 " and the other suspender craving deduction of the teind, as
 " use is; and the charger answering, That albeit, by ancient custom, the teind of old was excepted from the thirlage, yet
 " that now *res devenit in alium casum*; seeing the reason of the
 " exception was, that the teinds pertained not to him, but
 " belonged to the titular of the teinds, or to some others having right from him, whereby he was subject to them for
 " the said teind, and therefore would not come under the
 D " thirlage,

"thirlage, not being his own; but now that reason ceasing,
 "the exception ought to cease; seeing, according to the order
 "universally taken and established by law, every heritor has
 "the right of his own teinds, as this suspender hath also
 "right to his; and therefore the teind ought to come under
 "the course and rules of the rest of the corns growing on
 "the ground, seeing the defender will make the like use of
 "the teinds as he does of the rest of the corns growing, and
 "therefore ought to be subject to the same thirlage: Not-
 "withstanding of which answers, the Lords found, That the
 "suspender was not holden to grind his teind at the said
 "mill, as astricted thereto, and that the thirlage did not ex-
 "tend to the same, notwithstanding that the suspender had
 "purchased the right of his own teind; for the teind being
 "excepted *de sua natura*, and by the custom and practick of
 "the kingdom, out of the astriction, the acquiring the same
 "now by the person thirled altered not the thirlage to make
 "it to extend further, and to enlarge the same more than it
 "was of extent before this law and order of acquiring of the
 "right of teinds, which acquisition was not purchased to add
 "any benefit to him who had the right of the thirlage, and
 "to make the purchaser, by that his own purchase, to lie un-
 "der a far heavier servitude both against his intention and
 "against all reason; and therefore found, That the suspend-
 "er, for the teinds, might grind the same where he pleased,
 "or otherwise use or dispoise thereupon as he thought expe-
 "dient, and that he was not tied therein to the charger to
 "grind the same at the mill of the thirlage, neither as astrict-
 "ed nor as a free multure, but that he might use the said
 "teinds either to grind or not to grind the same as he pleased:
 "neither was it respected where the charger offered to prove,
 "that the heritors of the rest of the lands of the barony a-
 "stricted did grind their teinds at the said mill, which was
 "repelled, for their voluntary deed could not bind any other
 "who was not alike willing."

This

This case, your Lordships will see, is entirely the same with that first put in this petition, and differs widely from the present. All the growing corns had been astricted; but the teind had all along been excepted from the thirlage, though it is not expressly said, whether it was drawn actually by the titular or not, but either it was drawn, or at least the practice had been to allow a deduction for it: at last the person thirled acquires right to the teind; and upon this the proprietor of the mill insists, that he should pay multure for it, upon this principle, That the reason on account of which the teind had been formerly deduced was ceased. But this the court found would not do, and therefore assilzied. How the petitioner's vassals come to imagine, that this decision should aid them, is altogether incomprehensible. The petitioner maintains, that his vassals agreed to bring the teind to his mill as long as it was in their possession, which he proves by the uniform uninterrupted practice of doing so for ages; whereas no such meaning could be put upon the astriction Innerwick's vassals came under, because the uniform uninterrupted practice there had been, either to draw the teind, or to allow a deduction from the thirlage on account of it; and consequently that gentleman's plea stood upon a much narrower bottom than the petitioner's does. And as to what is said in the reasoning on the above case, That the teind is *sua natura* excepted; that is true, where the person thirled does not possess it along with the stock.

The petitioner shall now proceed to confirm the doctrine above stated, by several decisions of the court. The first case the petitioner refers to is Nicolson against feuers of Tillicultry, observed by Lord Stair, 14th January 1662: "The defenders alledged absolutor for as much of the corns as would pay the feu-duties, ministers stipends, and all public burdens, because they behoved to sell corns for satisfying of these; and in so far the corns were not their own; and so they could pay for no more corns than their own:

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"neither

by & take
note they
might have
claimed a
deduction for
corn they
behoved to
sell in order
to purchase
meat drink &
cloaths.

“neither could they be liable for dry multure, unless it were
 “constitute by writ; especially seeing the charger libels, not
 “upon the defenders infestment, or bonds of thirlage, but
 “upon his own infestment, only generally, as infest in the
 “mill of the barony.—The Lords repelled these alledgean-
 “ces, and sustained the decreet for all the corns, except seed,
 “horse-corn, and teind, which tholed not fire and water
 “within the thirl.”

To the same purpose judgment was given in the case of
 James Stewart *contra* feuers of Aberbadnoch, observed by
 Stair, January 8. 1662: “The defenders alledged further
 “absolvitor from the multure of the teind, because that was
 “not thirl, nor had the King any right thereto when he
 “granted the infestment of the mill. The pursuer replied,
 “The defence ought to be repelled, in respect of the long
 “possession in *molendo regio*, because the defenders and their
 “tenants, past forty years, paid multures of all their corns
 “promiscuously, without exception of teind: Likeas there
 “are several decreets produced for abstract multures of all the
 “corns without exception. The defender answered, That
 “the reply *non relevat*; for albeit long possession may make
 “a thirlage of the King’s own barony, yet that cannot be ex-
 “tended to other mens rights of their lands and teinds,
 “which cannot be thirled without their own consent, or de-
 “creets against themselves called; nor do the decreets bear
 “teind *per expressum*. The Lords found the defence relevant,
 “notwithstanding of the reply, except such teinds that thole
 “fire and water within the barony: And likewise sustained
 “the defence for the corns eaten by the defenders upon the
 “ground in the labouring,” &c.

The vassals answered to these decisions, That they only
 proved, that when teind was grinded, it behoved to pay mul-
 ture. But these decisions prove more; for they prove, that
 teind is not *sua natura* excepted when possessed along with the
 stock. And here it should be adverted to, that these decisions
 apply

apply directly to the present case, in which the persons thirled, in place of teind, pay bolls of meal, which must be grinded. But the petitioner is able to bring decisions still more in point. *Harcus, voce Multure*, N^o 723. "where the teind, if not drawn " or paid in *ipsis corporibus* to the titular or tacksman, but in " money, should be liable to multure as the stock."

The last decision which the petitioner shall quote, and which has not been formerly stated in the papers, is observed by Lord Stair, January 21. 1681. *Grierfon contra Gordon*. " Grierfon, as heritor of the mill of Glenassan, pursues Gordon of Spadoch for abstracted multures; who alledged, That " the fifth part of the grain must be free for the teind, which " is always multure-free, unless the thirlage had been consented to by the churchmen. 2^{do}, That he can be liable for " no multure of the seed or horse corn. 3^{tio}, That he can " be liable for no grain as abstracted, but such as he grinds at other mills, and not for what he sells. It was replied, " That prescription is equivalent to consent; and it is offered to be " proven, that the whole grain growing on the defender's land, " without any abatement for teind, paid multure. This reply the " Lords found relevant, but found no multure due for seed or " horse corn; but found multure due for all that was sold."

In fine, the petitioner does not maintain, That his vassals could thirl the teind to the prejudice of the titular's right to draw the *ipsa corpora*; but he submits to your Lordships, that they could thirl their possession of it; and that there is evidence they meant to do so when the thirlage was constituted, from the uniform uninterrupted practice for ages of bringing their whole oats, teind, and all, to the petitioner's mill. The petitioner has no occasion to enter into the question, Whether, in case his vassals acquired the right of titularity, they could claim any deduction on account of the teind? For it is not pretended, that they have or ever can have such a right. And, therefore, to conclude, the petitioner humbly contends, that as his vassals possess the teind just now in the same manner, and

and upon the same title they did when the thirlage was constituted, there is no reason for allowing them to make abstractions now on account of the teind, which it was understood and intended at the constitution of the thirlage, they should bring to the pursuer's mill, as well as the rest of their corns, as is evident from their immemorial and uninterrupted practice.

Throughout the whole train of decisions from the earliest periods to this day, ancient immemorial and uniform practice has been allowed to be the rule for ascertaining the *modus* of the thirlage. It presumes an antecedent consent agreeably to the usage. It cannot be doubted, that if a writing of ancient date should now appear, thirling the teind so long as the vassals enjoyed the same, and that the titular did not draw the *ipsa corpora*, this would be effectual. Immemorial usage proves, that such was the intendment of parties at the original constitution of this thirlage. A clearer possession has in no case occurred, not only immemorial and uniform, but when any abstractions were discovered, decreets taken and submitted to, for dry multures and other penal sums, without any distinction between stock and teind. There is now no change of circumstances from what it was 200 years ago; on the contrary, it has acquired double force by the length of time and uniform usage.

May it therefore please your Lordships, to alter your last interlocutor; and to find, That the petitioner's vassals in the lands of Jacktown, Newlands, and Allartown, are not intitled to claim any deduction from their thirlage to the pursuer's mill on account of the teind.

According to justice, &c.

JO. MACLAURIN.